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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**

8
9 Anthony Williams,

No. CV-24-02015-PHX-JJT

10 Plaintiff,

ORDER

11 v.

12 Pacific Sunwear of California LLC,

13 Defendant.

14

15 At issue are three related motions. Defendant Pacific Sunwear of California LLC
16 filed a Motion to Dismiss (Doc. 13, MTD) under Federal Rule of Civil Procedure 12(b)(2)
17 arguing that the Court lacks personal jurisdiction in this case. Rather than file a substantive
18 response thereto, Plaintiff Anthony Williams filed a Motion for Leave to Conduct Limited
19 Jurisdictional Discovery (Doc. 14) for the purpose of ascertaining additional facts that bear
20 upon the question of whether the Court has personal jurisdiction over Defendant. In the
21 same filing, Plaintiff also submitted a Motion to Extend Time to Respond to Defendant's
22 Motion to Dismiss. The Court finds these matters appropriate for resolution without oral
23 argument. *See* LRCiv 7.2(f). For the reasons set forth below, the Court denies Defendant's
24 Motion to Dismiss and denies as moot both of Plaintiff's Motions.

25 **I. Background**

26 Defendant is a California clothing retailer with its headquarters in California.
27 (Doc. 1-1, Ex. 5, Complaint ¶ 11.) Plaintiff is an Arizona resident who has sued Defendant
28 on his own behalf and on behalf of all similarly situated individuals in the state of Arizona.

1 (See *id.* ¶ 10.) This action arises out of allegations that Defendant routinely embeds its
2 marketing emails with “hidden spy pixel trackers” that allow Defendant to “capture
3 sensitive information, including the time and place where Plaintiff and other Arizona
4 residents open the email and what contents they clicked on.” (*Id.* ¶ 2.) Plaintiff alleges that
5 Defendant utilizes this spyware in order to “monitor Plaintiff and other Arizona residents’
6 behavior by collecting and storing the above tracking data to build a detailed profile of the
7 email recipients’ interests.” (*Id.*) According to the Complaint, Defendant has sent
8 marketing emails laden with spyware to numerous individuals in Arizona but has not
9 procured any of the recipients’ consent to collect, retain, or use their personal digital
10 information. (*Id.* ¶ 5.) The class, of which Plaintiff is the putative representative, consists
11 of “[a]ll persons within Arizona who have opened a marketing email containing a tracking
12 pixel from Defendant.” (*Id.* ¶ 31.) The condition that class members have actually opened,
13 rather than merely received, Defendant’s emails is important because the spy pixels are
14 alleged to become operative only when the host email is opened. (*Id.* ¶¶ 16–17.) There are
15 apparently thousands of members in this class. (*Id.* ¶ 33.)

16 The Complaint asserts a claim under Arizona Revised Statute § 44-1376.01(A)(1),
17 which provides that “[a] person shall not . . . [k]nowingly procure, attempt to procure,
18 solicit or conspire with another to procure a public utility record, a telephone record or
19 communication service record of any resident of this state without the authorization of the
20 customer to whom the record pertains or by fraudulent, deceptive or false means.”
21 (Complaint ¶¶ 3, 39–48.) Plaintiff initially filed this lawsuit in state court, but Defendant
22 removed pursuant to the Class Action Fairness Act of 2005. (Doc. 1.) Defendant then filed
23 its MTD for lack of personal jurisdiction under Rule 12(b)(2). The Complaint’s only
24 express allegation with respect to personal jurisdiction is an assertion that:

25 This Court may assert personal jurisdiction over Defendant in accordance
26 with the Arizona Constitution and the Constitution of the United States,
27 because Defendant knowingly conducts business in Arizona such that it has
28 sufficient minimum contacts with Arizona and has purposefully availed itself
of Arizona markets to make it reasonable for this Court to exercise
jurisdiction over Defendant, and because Plaintiff’s claims arise out of

1 Defendant's unlawful in-state actions, as Defendant violated the privacy
2 rights of Plaintiff and other Class members in this State.

3 || (Complaint ¶ 8.)

4 || II. Legal Standard

5 For a federal court to adjudicate a matter, it must have jurisdiction over the parties.
6 *Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 701 (1982).
7 “When a defendant moves to dismiss for lack of personal jurisdiction, the plaintiff bears
8 the burden of demonstrating that the court has jurisdiction.” *In re W. States Wholesale Nat.*
9 *Gas Antitrust Litig.*, 715 F.3d 716, 741 (9th Cir. 2013). “Because there is no statutory
10 method for resolving [personal jurisdiction], the mode of its determination is left to the trial
11 court.” *Data Disc, Inc. v. Sys. Tech. Assocs., Inc.*, 557 F.2d 1280, 1285 (9th Cir. 1977).

12 “When a district court acts on a defendant’s motion to dismiss under Rule 12(b)(2)
13 without holding an evidentiary hearing, the plaintiff need only make a prima facie showing
14 of jurisdictional facts to withstand the motion to dismiss.” *Ballard v. Savage*, 65 F.3d 1495,
15 1498 (9th Cir. 1995). The facts alleged in the complaint are generally accepted as true
16 unless controverted; the court “may not assume the truth of allegations in a pleading which
17 are contradicted by affidavit.” *Data Disc.*, 557 F.2d at 1284. “[C]onflicts between the facts
18 contained in the parties’ affidavits must be resolved in [the plaintiff’s] favor.” *Rio Props., Inc. v. Rio Int’l Interlink*, 284 F.3d 1007, 1019 (9th Cir. 2002) (citation omitted).
19

To establish personal jurisdiction over a nonresident defendant, the plaintiff must show that the forum state's long-arm statute confers jurisdiction over the defendant and that the exercise of jurisdiction comports with constitutional principles of due process. *Id.*; *Omeluk v. Langsten Slip & Batbyggeri A/S*, 52 F.3d 267, 269 (9th Cir. 1995). Arizona's long-arm statute allows the exercise of personal jurisdiction to the same extent as the United States Constitution. *See* Ariz. R. Civ. Proc. 4.2(a); *Cybersell v. Cybersell*, 130 F.3d 414, 416 (9th Cir. 1997); *A. Uberti & C. v. Leonardo*, 892 P.2d 1354, 1358 (Ariz. 1995) (stating that under Rule 4.2(a) "Arizona will exert personal jurisdiction over a nonresident litigant to the maximum extent allowed by the federal constitution"). Thus, a court in

1 Arizona may exercise personal jurisdiction over a nonresident defendant so long as doing
 2 so accords with constitutional principles of due process. *Cybersell*, 130 F.3d at 416.

3 Due process requires that a non-resident, non-consenting defendant have sufficient
 4 minimum contacts with the forum state so that “maintenance of the suit does not offend
 5 ‘traditional notions of fair play and substantial justice.’” *Int’l Shoe Co. v. Washington*, 326
 6 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). Courts
 7 recognize two forms of contacts-based personal jurisdiction within the confines of due
 8 process: “(1) ‘general jurisdiction’ which arises when a defendant’s contacts with the
 9 forum state are so pervasive as to justify the exercise of jurisdiction over the defendant in
 10 all matters; and (2) ‘specific jurisdiction’ which arises out of the defendant’s contacts with
 11 the forum state giving rise to the subject litigation.” *Birder v. Jockey’s Guild, Inc.*, 444 F.
 12 Supp. 2d 1005, 1008 (C.D. Cal. 2006).

13 **III. Discussion**

14 General jurisdiction is not at issue here. The Complaint alleges that Defendant is a
 15 California company with its headquarters in California. The Court therefore lacks general
 16 jurisdiction over Defendant. *See Daimler AG v. Bauman*, 571 U.S. 117, 137 (2014)
 17 (holding that the paradigmatic sources of general jurisdiction over a corporate entity are
 18 the entity’s place of incorporation and principal place of business). Moreover, the
 19 Complaint’s invocation of personal jurisdiction utilizes the language of specific
 20 jurisdiction, including “minimum contacts” and “purposefully availed.” (Complaint ¶ 8.)

21 In order for a court to exercise specific jurisdiction over a defendant, the defendant
 22 must have sufficient minimum contacts with the forum state. Courts in the Ninth Circuit
 23 apply a tripartite test to determine whether a defendant’s minimum contacts pass
 24 constitutional muster. *Morrill v. Scott Fin. Corp.*, 873 F.3d 1136, 1142 (9th Cir. 2017).
 25 First, “[t]he non-resident defendant must purposefully direct his activities or consummate
 26 some transaction with the forum or resident thereof; or perform some act by which he
 27 purposefully avails himself of the privilege of conducting activities in the forum, thereby
 28 invoking the benefits and protections of its laws.” *Id.* Second, “the claim must be one which

1 arises out of or relates to the defendant's forum-related activities." *Id.* And third, "the
 2 exercise of jurisdiction must comport with fair play and substantial justice, i.e. it must be
 3 reasonable." *Id.* Plaintiff bears the burden of satisfying the first two elements, but
 4 Defendant bears the burden of demonstrating the dissatisfaction of the third element. *Id.*
 5 All three elements are required for jurisdiction to lie. *See id.*

6 The first prong of the minimum contacts test contains two sub-prongs, namely the
 7 tests for whether a defendant has purposefully directed its activities to the forum state *or*
 8 purposefully availed itself of the privilege of conducting business in the forum state. *Id.*
 9 These two tests are disjunctive; only one need be met. *Id.* Although the jurisprudential
 10 dichotomy between purposeful direction and purposeful availment is not rigid in all
 11 instances, *see Impossible Foods Inc. v. Impossible X LLC*, 80 F.4th 1079, 1088–89 (9th
 12 Cir. 2023), courts "generally apply the purposeful availment test when the underlying
 13 claims arise from a contract, and the purposeful direction test when they arise from alleged
 14 tortious conduct." *Morrill*, 873 F.3d at 1142. Here, despite the Complaint's reference to
 15 purposeful availment, (Complaint ¶ 8), the Court agrees with Defendant's characterization
 16 of this action as a tort case, (MTD at 4–5). Therefore, the purposeful direction subcategory
 17 of the minimum contacts test applies.

18 Defendant relies on several Ninth Circuit cases for the proposition that the
 19 establishment of minimum contacts under the purposeful direction test "requires that the
 20 defendant . . . have (1) committed an intentional act, (2) expressly aimed at the forum state,
 21 (3) causing harm that the defendant knows is likely to be suffered in the forum state." *Morrill*, 873 F.3d at 1142 (quoting *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d
 23 797, 803 (9th Cir. 2004)); *accord Axiom Foods, Inc. v. Acerchem Int'l, Inc.*, 874 F.3d 1064,
 24 1069 (9th Cir. 2017). This test finds its genesis in the Supreme Court case of *Calder v.*
 25 *Jones*, 465 U.S. 783 (1984), which recognized that intentional conduct occurring outside a
 26 forum can nevertheless vest jurisdiction inside the forum if the conduct was calculated to
 27 cause injury in the forum. *See Schwarzenegger*, 374 F.3d at 803.

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1 Defendant concedes that the first element of the *Calder* “effects” test for purposeful
 2 direction is met here, as Defendant acknowledges that sending an email is an intentional
 3 act. (MTD at 5.) Defendant directs its MTD to the second element of the test, arguing that
 4 it did not expressly aim any relevant conduct at Arizona because courts the nation over
 5 have held that a generalized marketing campaign of national scope does not constitute
 6 express aiming at any particular state. (MTD at 5–8.) In support of this contention,
 7 Defendant cites a battery of caselaw, which the Court agrees supports Defendant’s specific
 8 proposition. However, Defendant skips a crucial step in its jurisdictional analysis. As will
 9 be explained below, the purposeful direction test only applies to tortious conduct that
 10 occurs outside the forum state. It does not govern tortious conduct that takes place inside
 11 the forum. In arguing that the elements of the purposeful direction test are not met here,
 12 Defendant neglects to grapple with the logically antecedent question of whether the alleged
 13 utilization of spyware took place inside or outside of Arizona. Instead, Defendant merely
 14 assumes that the complained-of conduct occurred outside Arizona, presumably in
 15 California. But that assumption may not be correct. And if Defendant’s use of spyware
 16 occurred in Arizona, then the purposeful direction test does not apply, in which case
 17 Defendant’s MTD rings hollow. The Court will first examine the Ninth Circuit’s
 18 explication of the outer limits of the *Calder* purposeful direction test before proceeding to
 19 an analysis of where Defendant’s allegedly tortious conduct occurred.

20 **1. Jurisdictional Rule Governing Torts Committed Inside the Forum**

21 *Morrill*, which Defendant relies upon and which applied the *Calder*-derived,
 22 effects-based purposeful direction test, held that its “analysis does not conflict with the
 23 well-established rule [] that, when a defendant engages in tortious activity toward a plaintiff
 24 in the state where that plaintiff resides, the defendant is subject to personal jurisdiction
 25 there.” 873 F.3d at 1148 (citing *Brainerd v. Governors of the Univ. of Alta.*, 873 F.2d 1257,
 26 1258–60 (9th Cir. 1989)). In *Morrill*, the Ninth Circuit invoked that rule as a mere aside.
 27 However, one year later, the Ninth Circuit explored the rule in detail. In *Freestream
 28 Aircraft (Berm.) Ltd. v. Aero L. Grp.*, 905 F.3d 597 (9th Cir. 2018), a Washington resident

1 working for a Washington company allegedly defamed a Bermudan company and a
 2 British-Swiss individual at a professional convention in Nevada. 905 F.3d at 601–02. The
 3 plaintiffs brought suit in Nevada against both the Washington company and the
 4 Washington individual. *Id.* The district court dismissed the case, finding a lack of personal
 5 jurisdiction under the purposeful direction test. *Id.* at 602–03. The Ninth Circuit reversed,
 6 holding that the district court had applied the wrong test for a case alleging tortious conduct
 7 that had occurred inside the forum state. *Id.* at 603–04.

8 “Generally, ‘the commission of an intentional tort in a state is a purposeful act that
 9 will satisfy the first two requirements of the minimum contacts test.’” *Id.* (cleaned up)
 10 (quoting *Paccar Int’l, Inc. v. Com. Bank of Kuwait, S.A.K.*, 757 F.2d 1058, 1064 (9th Cir.
 11 1985)). In *Freestream*, “[r]ather than look to the location of allegedly intentional tortious
 12 conduct, the district court’s minimum contacts analysis centered on what has become
 13 known as the ‘effects doctrine’ or ‘effects test’ of *Calder*[.]” *Id.* “The district court’s
 14 reliance on the *Calder* effects test was misplaced, however, because the inquiry under that
 15 test focuses on conduct that takes place *outside* the forum state and that has effects inside
 16 the forum state.” *Id.* (emphasis in original). Although the *Freestream* court declared that
 17 the district court’s analysis was erroneous, the Circuit court did not fault the district court
 18 for erring because the jurisprudence surrounding the Circuit’s interpretation of *Calder* was
 19 muddled at the time of the district court’s ruling. The appellate court therefore endeavored
 20 to clarify its jurisprudence relating to personal jurisdiction in tort cases.

21 After summarizing its caselaw following *Calder*, the *Freestream* court noted that,
 22 “[r]ead together, those statements comparing within-forum-state versus out-of-forum-state
 23 conduct, and contract versus tort actions, suggest that a purposeful direction analysis
 24 naturally applies in suits sounding in tort where the tort was committed outside the forum
 25 state.” *Id.* at 605. The court reaffirmed its traditional interpretation of *Calder*’s role in
 26 personal jurisdiction analyses, but the court also recognized that many of its more recent
 27 cases had lost track of *Calder*’s place in the jurisprudential firmament. “Although rigidly
 28 applying the *Calder* effects test without taking into account where the allegedly tortious

1 conduct occurred conflicts with our approach in *Paccar*, we may have unwittingly
 2 contributed to the district court's error by suggesting otherwise in a couple of our
 3 subsequent opinions." *Id.* The court concluded its sampling of its historical precedents by
 4 holding:

5 This review of the history of the effects doctrine and its place in our
 6 jurisprudence makes clear that *Paccar*, not *Calder*, is the proper starting
 7 place where an intentional tort is committed within the forum state. *Paccar*
 8 was rooted in the well-settled understanding that the commission of a tort
 within the forum state usually supports the exercise of personal jurisdiction.

9 The effects doctrine, on the other hand, makes more sense when dealing with
 10 out-of-forum tortfeasors.

11 *Id.* at 606 (internal citations omitted). Before concluding its analysis, however, the
 12 *Freestream* court distinguished its case from that of *Morrill*. The *Freestream* opinion
 13 contained the following synopsis and construction of *Morrill*.

14 In *Morrill*, the plaintiffs, residents of Arizona, filed suit in Arizona and
 15 alleged that the defendants engaged in conduct aimed at the forum state
 16 because the defendants filed suit against the plaintiffs for defamation in
 17 Nevada and then served process, sought subpoenas, and engaged in other
 18 allegedly abusive litigation-related tactics in Arizona. We found that because
 the defendants had not expressly aimed their conduct at Arizona, personal
 jurisdiction was lacking.

19 At first blush *Morrill* appears to conflict with *Paccar*, since some of the
 20 conduct did occur in Arizona. But the allegedly tortious conduct in *Morrill*
 21 was materially different from that in *Paccar* and here. Namely, it was the
 22 litigation—and only the litigation—that brought the *Morrill* defendants to
 Arizona. []

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25 Because the Nevada litigation *required* the defendants to conduct activity in
 26 Arizona (where the plaintiffs happened to reside), and the defendants thus
 27 were not in the forum state of their own volition, they had not availed
 28 themselves of the forum under the minimum contacts test. By contrast, in the
 instant case, Schmidt *voluntarily* traveled to Nevada to attend the aviation
 industry conference, and *voluntarily* agreed to speak with Shvetsova and
 Khalek there. In other words, Schmidt threw *Morrill*'s hypothetical rock.

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We therefore reject Defendants' invitation to find that *Morill*, rather than *Paccar*, applies to the circumstances here.

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Id. at 606–07 (emphasis in original) (internal citations omitted). Therefore, although *Morrill* involved allegedly tortious conduct that took place in the forum state, *Morrill* was adjudicated as if the conduct had not taken place in the forum state. Nevertheless, the traditional in-forum-state rule, as clarified by *Freestream*, continues to govern in the Ninth Circuit. Absent extraordinary circumstances such as those present in *Morrill*, if a defendant engages in tortious conduct inside the forum state, then the first two prongs of the minimum contacts test are automatically met. In such instances, there is no need to conduct a purposeful direction analysis. A court would proceed straight to the third prong, under which an objecting defendant must affirmatively demonstrate that the maintenance of jurisdiction offends fair play and substantial justice. This begs the question of where the relevant conduct in the instant case occurred.

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2. Where Does Digital Spying Occur?

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As noted above, Defendant has cited copious caselaw in support of its argument that national marketing campaigns, without more, do not give rise to personal jurisdiction in any particular state. However, all of these cases proceeded under either the purposeful direction test or the purposeful availment test. None of them conducted an analysis under the *Freestream/Paccar* rubric. Of course, that does not necessarily render such cases inapposite regarding the antecedent question of where a tort occurs. But in many of the cases cited by Defendant, the underlying tort occurred outside the forum, and the in-forum emails and other marketing activities were mere ancillary conduct invoked by the plaintiff as a jurisdictional hook.¹ Defendant also cites cases involving causes of action that are

¹ *Sundby v. Johnson*, No. CV-19-00107-TUC-RCC (BGM), 2020 WL 995572 (D. Ariz. Mar. 2, 2020) (case involving a claim for unjust enrichment regarding a Georgia trust, in which the plaintiff attempted to use email communications as a jurisdictional hook); *Gonzalez v. US Hum. Rts. Network*, 512 F. Supp. 3d 944 (D. Ariz. 2021) (case involving a claim for wrongful termination by a Georgia company of a fully remote employee discharging job duties unrelated to Arizona, in which the plaintiff attempted to use email communications as a jurisdictional hook); *Johnson v. Mitchell*, No. 2:10-CV-1968 GEB GGH, 2013 WL 595218 (E.D. Cal. Feb. 15, 2013) (case involving a claim for malicious

1 analytically distinct from intentional torts, such as claims for strict products liability and
 2 breach of contract, the jurisdiction for which the Ninth Circuit assesses by standards that
 3 are unrelated to the law governing intentional torts.² Only two of the cases Defendant cites
 4 are factually comparable to the case at bar. As discussed below, neither of those two cases
 5 is persuasive here.

6 As a matter of common sense, the intentional use of spyware on an unwitting
 7 victim's computer must be deemed a tort that occurs inside the forum where the victim is
 8 located. It makes no difference that emails and many other kinds of digital interaction
 9 launch in a location-agnostic manner, such that the sender of a malicious communication
 10 neither knows nor cares where the recipient is physically located. Were it otherwise, a
 11 cyber-thief could deliberately infect a person's computer with malware in order to steal his
 12 social security number and banking information and then evade personal jurisdiction
 13 simply because the tortfeasor sent the malware from outside the victim's forum without
 14 knowledge of where the victim was physically located. Similarly, a cyber-bully could send
 15 a malicious communication to a victim encouraging the victim to commit suicide and then
 16 evade personal jurisdiction in the victim's forum. The law does countenance such an absurd
 17 and unjust state of affairs.

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19 prosecution occurring in Panama, in which the plaintiff attempted to use email
 20 communications as a jurisdictional hook); *Lauck v. County of Campbell*, No. CV-21-
 21 08036-PCT-MTL, 2021 WL 2780868 (D. Ariz. July 2, 2021) (case involving various
 22 claims arising entirely out of conduct occurring in Wyoming, in which the plaintiff
 23 attempted to use email communications as a jurisdictional hook); *James v. Caesars Ent.*
Corp., No. CV-19-01310-PHX-JAT, 2019 WL 4673338 (D. Ariz. Sept. 25, 2019) (case
 24 involving claims for employment discrimination occurring entirely outside of Arizona, in
 25 which the plaintiff attempted to use email communications as a jurisdictional hook); *Legendz Ent., LLC v. Cam Specialty Lending 1, Ltd.*, No. 2:23-CV-03097-ODW (MARX),
 26 2024 WL 2848263 (C.D. Cal. June 5, 2024) (case involving a claim for fraudulent
 27 inducement regarding a financial transaction occurring entirely outside the forum, in which
 28 the plaintiff attempted to use email communications as a jurisdictional hook); *Lewis v. Four
 Seasons Hotel Ltd.*, No. CV 23-2830-DMG (PVCX), 2024 WL 2104399 (C.D. Cal. Mar.
 29, 2024) (case involving premises liability for an accident occurring in Tanzania, in which
 the plaintiff attempted to use marketing communications as a jurisdictional hook).

27 ² *Glutz v. Fitness Int'l LLC*, No. CV-19-02578-PHX-SRB, 2020 WL 7016469 (D.
 28 Ariz. June 11, 2020); *Chorost v. Rotor Am. Inc.*, No. CV-21-00235-TUC-RCC (LCK),
 2022 WL 17361299 (D. Ariz. Aug. 8, 2022); *Casiano v. Predator Motorsports Inc.*, No.
 CV-23-01145-PHX-DLR, 2023 WL 6127720 (D. Ariz. Sept. 19, 2023).

1 In exploring the nuances of personal jurisdiction, the Ninth Circuit has twice used
2 the example of a person throwing a rock through another person's window. *See Morrill*,
3 873 F.3d at 1148; *Freestream*, 905 F.3d at 607. The Court finds this analogy instructive
4 and adapts it to the facts of this case as follows. Suppose a person erected a catapult capable
5 of launching rocks a great distance. Suppose further that this person then loaded his catapult
6 with rocks and donned a blindfold such that he would not know where the catapult was
7 aimed. This person then proceeds to fling rocks in all manner of directions. These rocks
8 land in various fora around the nation, causing property damage and personal injury. Each
9 of the victims sues the tortfeasor in his or her home forum. The defendant then files
10 dismissal motions under Rule 12(b)(2) in each of those fora on the grounds that he
11 (1) launched the rock from his own home state and (2) did not know where the rock would
12 land. Dismissal would not be appropriate in such an instance. Likewise here. Defendant
13 has sent marketing emails to people residing throughout the nation, but these marketing
14 emails are alleged to have been embedded with targeted spyware that inflicted
15 particularized and distinct privacy deprivations upon each recipient whenever he or she
16 opened the tainted communication. The Complaint pleads an intentional tort that, but for
17 its digital character, is materially indistinguishable from the tort of a thrown rock. Absent
18 binding caselaw to the contrary, the Court concludes that it possesses personal jurisdiction
19 over Defendant in this case.

20 At least one case from a court within this Circuit supports the approach and
21 conclusion above. In *WhatsApp Inc. v. NSO Grp. Techs. Ltd.*, 472 F. Supp. 3d 649 (N.D.
22 Cal. 2020), the plaintiff WhatsApp alleged that “defendants sent malware, using
23 WhatsApp’s system, to approximately 1,400 mobile phones and devices designed to infect
24 those devices for the purpose of surveilling the users of those phones and devices.” 472 F.
25 Supp. 3d at 658. Although the court applied the *Calder* effects test, it nevertheless analyzed
26 where the relevant tort occurred and concluded that the tort occurred in the state where the
27 digital hijacking was alleged to have taken place. *Id.* at 672–73.

28

1 In their reply brief, defendants argue that, even if WhatsApp had servers in
2 California and NSO sent messages through those servers, there is no
3 allegation or argument that NSO selected the location of the server. In other
4 words, defendants contend the location of the server is fortuitous and their
5 claims would have been the same if the servers were located in Cleveland,
6 Paris, or Timbuktu. The express aiming prong depends on the type of tort
7 alleged, and here plaintiffs allege that defendants targeted and accessed
8 WhatsApp's servers without authorization. The location of the servers is,
9 therefore, not a fortuity but central to the alleged tortious conduct. For
10 example, courts have analogized a CFAA cause of action to digital "breaking
11 and entering" and a "trespass offense" similar to the common law trespass to
12 chattels offense alleged. By sending malicious code to the California based
13 servers, defendants allegedly caused a digital transmission to enter
14 California, which then effectuated a breaking and entering of a server in
15 California.

16 *Id.* (internal citations omitted). Defendant's MTD in this case rests upon a nearly identical
17 argument. Although Defendant admits that it sent Plaintiffs marketing emails that allegedly
18 contained spyware, Defendant argues that that act does not confer jurisdiction in Arizona
19 because Defendant did not intend that Plaintiff would be located in Arizona when he
20 opened the email and thereby activated the alleged hidden spy pixels. Consistent with the
21 Northern District of California's holding in *WhatsApp*, the Court concludes that it does not
22 matter whether Defendant intended that Plaintiff trigger its alleged spy pixels in Arizona
23 or anywhere else. The operation of spyware in Arizona by itself establishes personal
24 jurisdiction over Defendant in this forum, absent a showing of unfair play or substantial
25 injustice. It is significant that Plaintiff's Complaint is limited to those instances where a
26 victim opened the allegedly invasive emails, thereby triggering the latent spyware. The
27 underlying statute proscribes the fraudulent procurement of communication records, as
28 well as attempts, solicitations, and conspiracies to fraudulently procure communication
records. A.R.S. § 44-1376.01(A)(1). The Court does not address where such inchoate
offenses might occur. Insofar as the case at bar is concerned, it is enough to conclude that
the actual operation of the alleged spyware occurred in Arizona and thereby vests
jurisdiction in this forum.

1 Defendant finds its strongest support in *Sessa v. Ancestry.com Operations Inc.*, 713
 2 F. Supp. 3d 997 (D. Nev. 2024), in which two plaintiffs alleged that the defendant's use of
 3 private family information in its online database and marketing emails infringed the
 4 plaintiffs' right to be free from publicity under a Nevada statute. 713 F. Supp. 3d at 1001.
 5 Although much of the court's analysis focused on the defendant's maintenance of its
 6 allegedly intrusive website, which is not relevant here, the court also held that "Plaintiffs'
 7 injury, that their personal information is impermissibly being used to sell Ancestry
 8 subscriptions, would 'follow them wherever they might [choose] to live or travel,' and is
 9 not enough to demonstrate that Ancestry's actions were aimed at Nevada." *Id.* at 1006
 10 (cleaned up) (quoting *Briskin v. Shopify, Inc.*, 87 F.4th 404, 416 (9th Cir. 2023)). The *Sessa*
 11 court expressly rested its conclusion on the Ninth Circuit's holding in *Briskin*. *Id.* at 1004
 12 ("Because the Court's reasoning in the previous Order is inconsistent with the Ninth
 13 Circuit's holding in *Briskin*, the Court exercises its inherent power to amend interlocutory
 14 orders and GRANTS Defendant's Motion for Reconsideration. The Court will now apply
 15 the Ninth Circuit's reasoning in *Briskin* to the case at hand."). In *Briskin*, the Ninth Circuit
 16 held that, "[w]hen a company operates a nationally available e-commerce payment
 17 platform and is indifferent to the location of end-users, the extraction and retention of
 18 consumer data, without more, does not subject the defendant to specific jurisdiction in the
 19 forum where the online purchase was made." 87 F.4th at 409. The Court need not determine
 20 whether or to what extent *Briskin* and *Sessa* are inconsistent with the Court's analysis
 21 herein, because the Ninth Circuit has vacated its opinion in *Briskin* and granted a rehearing
 22 *en banc*. *Briskin v. Shopify, Inc.*, 101 F.4th 706 (9th Cir. 2024). Therefore, *Briskin* is
 23 immaterial and *Sessa* is unpersuasive.

24 The Ninth Circuit has previously acknowledged the difficulty present in the
 25 adjudication of personal jurisdiction in cases where the relevant conduct occurs in the
 26 digital sphere. *Mavrix Photo, Inc. v. Brand Techs., Inc.*, 647 F.3d 1218, 1229 (9th Cir.
 27 2011) ("In prior cases, we have struggled with the question whether tortious conduct on a
 28 nationally accessible website is expressly aimed at any, or all, of the forums in which the

1 website can be viewed.”). Much of this difficulty arises from tension between the realities
2 of digital conduct and the Supreme Court’s instruction that “[d]ue process requires that a
3 defendant be haled into court in a forum State based on his own affiliation with the State,
4 not based on the ‘random, fortuitous, or attenuated’ contacts he makes by interacting with
5 other persons affiliated with the State.” *Walden v. Fiore*, 571 U.S. 277, 286 (2014) (quoting
6 *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985)). Applying those tenets, the
7 Ninth Circuit has held that geo-specific advertising does not by itself vest jurisdiction over
8 a trademark dispute in any particular forum. *AMA Multimedia, LLC v. Wanat*, 970 F.3d
9 1201, 1211 (9th Cir. 2020). Similarly, a court in this District held that jurisdiction is not
10 vested in a forum merely because a digital advertisement containing an alleged trademark
11 violation appeared on a person’s computer in that forum. *Modulus Fin. Eng’g Inc. v.*
12 *Modulus Data USA Inc.*, No. CV-19-04685-PHX-SMB, 2020 WL 2512785, at *5 (D. Ariz.
13 May 15, 2020). Those holdings, although somewhat related to the facts of the instant case,
14 are distinguishable.

15 Plaintiff’s claim of illicit digital surveillance is materially different from a claim of
16 trademark infringement. The analysis of a tort claim “depends on the type of tort alleged.”
17 See *WhatsApp*, 472 F. Supp. 3d at 672. Although each email containing an alleged
18 trademark violation in some sense constitutes the violation itself, it is more sensible to view
19 such emails as distinct manifestations of a single violation, at least for purposes of personal
20 jurisdiction. In contrast, each instance of Defendant’s alleged spying on Plaintiff and other
21 similarly situated individuals is a specific, factually distinct tort. The emails in this case are
22 not mere marketing materials by which a preexisting trademark violation is further
23 disseminated to a wider audience. Instead, the emails here are alleged to be trojan horses
24 containing spyware that effects a discrete, intentional tort on each victim who opens the
25 email. The myriad instances of alleged spying are thus not iterations of an ongoing
26 violation, but are each separate offenses unto themselves, with unique facts and unique
27 victims. In other words, the offensive emails in trademark cases can be viewed as evidence
28 of a violation against a competing company, but the recipient of the email is hardly a victim

1 of the complained-of conduct. Here, the emails *are* the offensive conduct, and the
2 recipients *are* the victims. Although the circumstances surrounding the receipt of an email
3 containing a trademark violation may be fortuitous to the trademark violation itself, the
4 circumstances surrounding a deliberate act of spying are not fortuitous to the spying. This
5 conclusion is the basis of the Ninth Circuit's unequivocal holding that the commission of
6 an intentional tort generally confers personal jurisdiction upon courts in the forum where
7 the tort occurred. *See Freestream*, 905 F.3d at 606. A defendant cannot commit an
8 intentional tort in a forum and then claim that the location of his victim renders jurisdiction
9 in that forum fortuitous. Denying jurisdiction in such cases would be a nonsensical windfall
10 to the tortfeasor. In short, the emails sent by Defendant in this case are akin to the Ninth
11 Circuit's proverbial rock. Thus, under *Freestream*, the first two elements of the minimum-
12 contacts test are satisfied, and it becomes Defendant's burden to establish that personal
13 jurisdiction in this case would contravene traditional notions of fair play and substantial
14 justice.

15 Defendant has not attempted to make such a showing, and nor could it. Defendant
16 concedes that it conducts activities in this forum. (MTD at 9.) Although Defendant's
17 Arizona activities are unrelated to Plaintiff's claims and are therefore insufficient to satisfy
18 the purposeful direction test, the Court can consider such activities in the context of the
19 substantial justice analysis. Because Defendant already conducts business in this forum,
20 the Court concludes that it would not be unduly burdensome for Defendant to litigate this
21 case in Arizona. Therefore, personal jurisdiction is proper. Because the Court rejects
22 Defendant's MTD, it need not consider Plaintiff's motions for limited jurisdictional
23 discovery and an extension of time to respond to the MTD. Although it is procedurally
24 anomalous for a district court to dispose of a motion to dismiss without adversarial briefing,
25 in this case the alternative course of action would have required adjudication of two
26 laborious and vigorously contested motions, the relevance of which depends entirely on
27 the validity of Defendant's MTD. Rather than waste the time and resources of all involved,
28 the Court elects to simply deny Defendant's MTD on the merits.

1 **IT IS THEREFORE ORDERED** denying Defendant's Motion to Dismiss
2 Plaintiff's Complaint. (Doc. 13.)

3 **IT IS FURTHER ORDERED** denying as moot Plaintiff's Motion for Leave to
4 Conduct Limited Jurisdictional Discovery and to Extend Time to Respond to Motion to
5 Dismiss. (Doc. 14.)

6 Dated this 30th day of October, 2024.

Honorable John J. Tuchi
United States District Judge